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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RASHID DEARY-SMITH,

Defendant and Appellant.

C090444

(Super. Ct. No. 11F04334)

Appointed counsel for defendant Rashid Deary-Smith filed an opening brief setting forth the facts of the case and asking this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) After reviewing the entire record, we affirm the judgment and order correction of the amended abstract of judgment to reflect defendant's sentence.

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

FACTUAL AND PROCEDURAL BACKGROUND

Following a trial, a jury found defendant guilty of attempted murder, first degree burglary, being a felon in possession of a firearm, and two counts of attempted first degree robbery. The jury also found several firearm enhancements true. The facts underlying defendant's convictions are described in *People v. Deary-Smith* (Apr. 3, 2019, C080821) (nonpub. opn.), and we need not recount them here. The trial court sentenced defendant to an aggregate term of 21 years 8 months in prison, including enhancements under Penal Code sections 12022.53, subdivision (b) and 12022.5, subdivision (a).¹ As part of his sentence, the court revoked defendant's existing probation for burglary in another case, No. 09F02047, and imposed a concurrent eight months, one-third the middle term, on the underlying conviction.

On appeal, this court affirmed defendant's convictions for attempted murder (count 3) and first degree burglary (count 4) and remanded the matter for the trial court to exercise its discretion to strike any firearm enhancement under Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682, §§ 1-2), which amended sections 12022.5 and 12022.53 to allow the trial court discretion pursuant to section 1385 to strike or dismiss an enhancement. This court also remanded for resentencing on the felon in possession of a firearm charge (count 5) and the burglary charge in case No. 09F02047 (count 1).

On remand, the trial court held a hearing to exercise its discretion to strike the enhancements and resentence defendant. Defendant asked the court to strike the gun enhancements because he had suffered a "neurocognitive disorder that removed some significant portion of his brain function that will affect him for the rest of his life," after being shot in the head during the crimes, and he did not shoot his gun during the incident,

¹ Further undesignated references are to the Penal Code.

despite opportunities to do so. The prosecutor opposed the request given “the egregious facts of this case and the defendant’s actions with his accomplice.” The court declined to strike the enhancements, reasoning that defendant’s crimes were “quite violent” and there was “absolutely no conceivable way” that striking the gun enhancements would be an “appropriate resolution.”

The trial court resentenced defendant to the upper term of nine years for the attempted murder charged in count 3; a consecutive 10 years for the gun enhancement attached to count 3 (§ 12022.53, subd. (b)); a consecutive one-third the midterm, or 16 months, for burglary charged in count 4; a consecutive one-third the midterm, or 16 months, for the gun enhancement attached to count 4 (§ 12022.5); a stayed low term of 16 months on count 5; and imposed a concurrent low term of 16 months with respect to burglary in case No. 09F02047, for a total of 21 years 8 months. The court converted the \$300 restitution fine (§ 1202.4) to a concurrent sentence of nine days, striking all nonmandatory fines. The court imposed the original fines, including a \$120 court operations fee (§ 1465.8) and a \$90 conviction assessment (Gov. Code, § 70373). According to the court minutes and abstract of judgment, custody credits were to be calculated by the Department of Corrections and Rehabilitation. The amended abstract of judgment indicates the court granted defendant 1,014 days of actual credit and 152 days of conduct credit for a total of 1,166 days in the primary case plus 845 days in case No. 09F02047.²

Defendant appeals. He did not obtain a certificate of probable cause.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts and procedural history of the case and requests this court to

² On this court’s own motion, the record on appeal was augmented to include the amended felony abstract of judgment, dated January 10, 2020.

review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of his right to file a supplemental brief within 30 days from the date the opening brief was filed. More than 30 days have elapsed, and defendant has not filed a supplemental brief.

Our review of the record reveals two clerical errors in the amended abstract of judgment. First, the total amounts for the conviction assessment under Government Code section 70373 and the court operations assessment under section 1465.8 are not listed. The abstract notes that the restitution fine, the convictions assessment, and the court operations assessment were converted to a concurrent sentence of nine days. This was not what the court ordered. Rather, the court converted the \$300 restitution fine (§ 1202.4) to a concurrent sentence of nine days, struck all nonmandatory fines, and reimposed the remaining original mandatory fines. (§ 1465.8, subd. (a) [assessment applies to “every conviction”]; Gov. Code, § 70373, subd. (a) [same]; see also *People v. Smith* (2001) 24 Cal.4th 849, 853 [appellate court may correct error in not imposing mandatory financial obligations].) Second, during the resentencing hearing, the court imposed and stayed a low term of 16 months on count 5. However, the amended abstract inaccurately states that the court imposed and stayed a consecutive one-third the midterm sentence of eight months on count 5. Both of these clerical errors must be corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts may “correct clerical errors at any time” and order “correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts”].)

Having undertaken an examination of the entire record pursuant to *Wende*, we find no arguable error that would result in a disposition more favorable to defendant. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the amended abstract of judgment to reflect that defendant must pay a conviction assessment of \$30

per count, for a total of \$90 and a court operations assessment of \$40 per count, for a total of \$120. The court is further directed to correct the amended abstract of judgment to reflect that the court imposed and stayed a low term of 16 months on count 5. A certified copy of the corrected abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
DUARTE, J.